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# Lim Choon Seng v Lim Poh Kwee

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-16–03 OF 2019(J)
AZAHAR MOHAMED CJ (MALAYA), ROHANA YUSUF, ABANG ISKANDAR, NALLINI PATHMANATHAN, AND ABDUL RAHMAN SEBLI FCJJ
C 29 JULY 2020

*Civil Procedure — Appeal — Notice of appeal — Several defendants sued separately in separate suits by same plaintiff on common cause of action agreed to be bound by decision of trial court in one 'test case' — High Court decided test case*
D *against defendants — Whether one notice of appeal filed by the losing defendant in the test case against trial court's verdict sufficed to be considered as an appeal filed by all the other defendants — Whether liability of each defendant was distinct and separate as reflected in separate judgments affecting each defendant — Whether there was no agreement among all other defendants to be bound by outcome of*
E *appeal filed by test case defendant — Whether law did not permit all defendants aggrieved by trial court's verdict in test case to 'hitch a ride' on test case defendant's notice of appeal — Definition of 'test case' — Procedure to be followed in appeal from decision in a 'test case'*

F If several defendants separately sued by the same plaintiff on a common cause of action agreed to abide by the verdict at trial of one of those cases as a 'test case', and if the defendant in the test case lost, could the rest of the defendants consider themselves as included in the notice of appeal filed by the defendant in the test case or did they have to individually file their own notices of appeal
G against the trial court's decision? This was the central question in the instant appeal. In his capacity as the registered Public Officer of Eng Choon Association Muar, Johor, the appellant had filed 50 suits in the High Court against 50 different defendants (one of whom was the respondent) for orders that the respective defendants quit and deliver up vacant possession of their
H respective demised premises to the appellant. In each case, the defendant had raised a counterclaim against the appellant. Since the appellant had obtained judgment in default against 13 of the 50 defendants, and as the facts and issues of law in all the cases were the same, 36 of the remaining 37 defendants agreed to be bound by the decision of the trial court in the action between the
I appellant and the respondent as the 'test case'. No order was made to consolidate the suits or to try them as one action. At the conclusion of the trial, the High Court allowed the appellant's claim and dismissed the respondent's counterclaim and directed the appellant to prepare and file separate judgments for each of the 37 suits to reflect the orders made. Dissatisfied with the decision,

the respondent filed a notice of appeal to the Court of Appeal ('COA') which set out the case numbers of all the remaining 36 suits. The 36 other defendants did not file their own notices of appeal. The COA allowed the respondent's appeal, set aside the High Court's decision and ordered that its decision was to bind the other 36 defendants. Aggrieved by the COA's verdict, the appellant obtained leave to appeal against the same to the Federal Court. At the hearing of the instant appeal, the appellant argued that since there was no consolidation of all the suits against the defendants or an order that they be tried as one action, it was incumbent upon each defendant adversely affected by the trial court's decision to have filed separate notices of appeal to the COA and not rely upon the respondent's notice of appeal. On the other hand, the respondent contended that since all the other 36 suits were bound by the decision of the trial court in the test case, and since an appeal operated as a re-hearing, the other defendants could rely upon the respondent's notice of appeal and be bound by the outcome of the respondent's appeal.

**Held**, allowing the appeal, setting aside the COA's decision and reinstating the decision of the High Court:

(1) The COA was wrong to order that its decision was to bind the other 36 defendants. The order conflicted with two principles of law, namely: (a) where proceedings were separate and distinct, separate notices of appeal had to be filed; and (b) a court could not pronounce any judgment or order that bound non-parties who were not properly brought before the Court unless it was a case involving injunctions or where the non-party was the alter-ego of the person already impleaded and before the court. The COA's decision could not, in law, reverse the separate orders that were made by the High Court against the defendants in the 36 other suits where no appeals were lodged by those defendants (see paras 72, 74 & 76).

(2) The proper procedure to be followed in an appeal involving a 'test case' was as follows: (a) an agreement by all parties for one case to be tried as the 'test case' and that the decision in the test case would bind all other parties in the other related cases; (b) pronouncement of the decision in the test case; (c) formal judgments to be drawn up for each and every case even if the court had not made such an order; (d) separate notices of appeal to be lodged by each and every party aggrieved by the decision in the test case; and (e) if more than one appeal was lodged, the appeals should be heard together (see para 75).

(3) The mere existence of an agreement between the parties to be bound by the decision in the test case could not in law exempt the other parties from lodging their own notices of appeal against the decision. Although the liabilities of the other 36 defendants were determined by the respondent's liability in the test case, the liabilities of all 37 defendants

(including the respondent) was separate and distinct. There was no merger or joinder of liability. The effect of the decision in the test case was that although one judgment was pronounced, it was as if 37 separate judgments had been delivered by the trial court. Even if the parties had agreed for a single notice of appeal to be filed against the decision in the test case, such an agreement could not override the legal requirement that notices of appeal had to be filed by each of the other 36 defendants in order to properly bring them and the other 36 suits before the COA (see paras 49–53).

(4) The agreement between the parties to be bound by the decision in the test case came to an end once judgment in the test case was pronounced and the trial ended. Thereafter, the other 36 defendants had to decide for themselves whether or not to appeal against trial court's decision. There was no agreement between the parties to be bound by the decision of the COA in the appeal brought by the respondent. It was wrong to suggest that the validity of the agreement extended beyond the trial stage as there were rules governing appeals to the COA that the other 36 defendants had to comply with. Those rules applied to each and every one of the defendants and not just to the defendant in the test case, such as the payment of appeal deposits into court. The need to comply with those rules underscored the need for the other parties to lodge their own appeals against the trial court's decision in the test case with the attendant consequences of failing to do so. Nothing in the Rules of the Court of Appeal 1994 allowed for the mode adopted by the respondent in the present appeal (see paras 18, 54–56, 61 & 70).

(5) The COA had no jurisdiction to set aside the trial court's decision vis a vis the other 36 defendants in the absence of notices of appeal lodged by them. The argument that an appeal was a rehearing only held true where there was an appeal against a decision. In the present case, there was only one appeal lodged and that was by the respondent. By not appealing, the 36 other defendants must be deemed to have accepted the decision of the trial court (see paras 58–59).

(6) In dismissing the appellant's claim, the COA failed to recognise that the respondent's failure to comply with the notice to quit was a separate pleaded basis for the appellant's claim. The claim was not premised solely and entirely on the respondent's failure to pay the annual rent (see paras 77–78).

(7) On the evidence, the trial court was correct in allowing the appellant's claim after finding as a fact that the respondent had failed to comply with the appellant's notice to quit which had been given more than one year earlier. The COA had no compelling reason to set aside the trial court's decision. The COA's decision was based on the wrong premise that the annual rent had been paid by the respondent without appreciating that

the appellant's claim was also premised on the respondent's failure to adhere to the notice to quit. This error by the COA was serious enough to warrant interference by this court (see paras 79–81).

**[Bahasa Malaysia summary**

Sekiranya beberapa defendan telah menyaman plaintif yang sama atas satu kausa tindakan yang serupa bersetuju untuk mematuhi dapatan perbicaraan salah satu kes tersebut sebagai satu 'test case', dan sekiranya defendan dalam 'test case' tersebut tewas, bolehkah defendan yang lain menganggap diri mereka sebagai sebahagian daripada notis rayuan yang difailkan oleh defendan dalam 'test case' tersebut atau mereka harus secara individu memfailkan notis rayuan mereka terhadap keputusan mahkamah bicara? Ini adalah persoalan utama dalam rayuan ini. Dalam kapasiti beliau sebagai seorang pegawai awam berdaftar Persatuan Eng Choon Muar, Johor, perayu telah memfailkan 50 guaman di Mahkamah Tinggi terhadap 50 defendan berbeza (salah satu daripada mereka adalah responden) untuk perintah agar defendan tersebut beredar dan menyerahkan milikan kosong premis mereka kepada perayu. Dalam setiap kes, defendan telah membangkitkan tuntutan balas terhadap perayu. Memandangkan perayu telah menerima penghakiman ingkar terhadap 13 daripada 50 defendan, dan fakta dan isu undang-undang dalam kesemua kes adalah sama, 36 daripada 37 defendan yang tinggal bersetuju untuk terikat dengan keputusan mahkamah bicara dalam tindakan antara perayu dan responden sebagai 'test case'. Tiada perintah telah dibuat untuk menyatukan guaman tersebut atau untuk membicarakan mereka sebagai satu tindakan. Di akhir perbicaraan, Mahkamah Tinggi membenarkan tuntutan perayu dan menolak tuntutan balas responden dan mengarahkan perayu untuk menyediakan dan memfailkan penghakiman berbeza untuk setiap satu daripada 37 guaman tersebut untuk menggambarkan perintah yang dibuat. Tidak berpuas hati dengan keputusan tersebut, responden telah memfailkan notis rayuan kepada Mahkamah Rayuan (MR) yang meletakkan nombor kes untuk kesemua 36 guaman yang lain. 36 defendan yang lain tidak memfailkan notis rayuan mereka sendiri. MR membenarkan rayuan responden, mengetepikan keputusan Mahkamah Tinggi dan memerintahkan agar keputusannya mengikat 36 defendan yang lain. Terkilan dengan dapatan MR, perayu mendapatkan izin untuk merayu keputusan tersebut ke Mahkamah Persekutuan. Pada pendengaran rayuan ini perayu menghujahkan atas sebab tiada penyatuan kesemua guaman terhadap defendan atau satu perintah yang ianya dibicarakan sebagai satu tindakan, adalah menjadi keperluan agar setiap satu defendan yang terkilan dengan keputusan mahkamah bicara untuk memfailkan notis rayuan berasingan ke MR dan tidak bergantung kepada notis rayuan responden. Disebaliknya, responden menyatakan bahawa memandangkan 36 guaman yang lain terikat dengan keputusan mahkamah bicara dalam 'test case', dan memandangkan satu rayuan bertindak sebagai satu pendengaran semual, defendan lain boleh bergantung kepada notis rayuan responden dan terikat dengan keputusan rayuan responden.

**Diputuskan**, membenarkan rayuan, mengetepikan keputusan MR dan mengekalkan keputusan Mahkamah Tinggi:

(1) Mahkamah Rayuan terkhilaf untuk memerintahkan agar keputusannya mengikat 36 defendan yang lain. Perintah tersebut bercanggah dengan dua prinsip undang-undang iaitu: (a) prosiding adalah berbeza, dan notis rayuan yang berasingan haruslah difailkan; dan (b) satu mahkamah tidak boleh mengisytiharkan apa-apa penghakiman atau perintah yang mengikat individu yang bukan pihak yang tidak dibawa kehadapan mahkamah kecuali mana ianya merupakan kes melibatkan injunksi atau apabila individu yang tidak merupakan pihak adalah alter-ego kepada individu yang telahpun diplidkan dan dihadapan mahkamah. Keputusan MR tidak boleh disisi undang-undang, menerbalikkan perintah berasingan yang dibuat oleh Mahkamah Tinggi terhadap defendan dalam 36 guaman yang lain yang mana tiada rayuan difailkan oleh defendan tersebut (lihat perenggan 72, 74 & 76).

(2) Prosedur yang sepatutnya dipatuhi dalah rayuan melibatkan satu 'test case' adalah seperti berikut: (a) satu perjanjian oleh semua pihak untuk satu kes dibicarakan sebagai 'test case' dan keputusan dalam 'test case' tersebut akan mengikat semua pihak lain dalam kes lain yang berkaitan; (b) pengisytiharan keputusan dalam 'test case' tersebut; (c) penghakiman formal dilakukan untuk setiap satu kes walaupun mahkamah tidak membuat perintah sedemikian; (d) notis rayuan berasingan difailkan oleh setiap pihak yang terkilan oleh keputusan dalam 'test case'; dan (e) sekiranya lebih dari satu rayuan difailkan rayuan tersebut akan didengar secara bersama (lihat perenggan 75).

(3) Kewujudan persetujuan antara pihak-pihak agar akan terikat dengan keputusan dalam 'test case' tersebut tidak boleh disisi undang-undang melepaskan pihak-pihak daripada memfailkan notis rayuan mereka masing-masing terhadap keputusan. Walaupun liabiliti 36 defendan yang lain ditentukan oleh liabiliti responden dalam 'test case' tersebut, liabiliti 37 defendan (termasuk responden) adalah berasingan dan berbeza. Tiada penyatuan liabiliti. Kesan keputusan dalam 'test case' tersebut adalah walaupun satu penghakiman telah diisytiharkan, ianya adalah seakan-akan 37 penghakiman berbeza telah diberikan oleh mahkamah bicara. Walaupun pihak-pihak bersetuju untuk satu notis rayuan difailkan terhadap keputusan dalam 'test case', persetujuan tersebut tidak boleh melampaui keperluan undang-undang bahawa notis rayuan harus difailkan oleh setiap seorang daripada 36 defendan yang lain untuk membawa mereka dan 36 guaman tersebut kehadapan MR (lihat perenggan 49–53).

(4) Persetujuan antara pihak-pihak untuk terikat dengan keputusan 'test case' tamat apabila penghakiman dalam 'test case' diisytiharkan dan perbicaraan berakhir. Selepas dari itu, 36 defendan yang lain perlu

membuat keputusan untuk diri mereka sendiri sama ada ingin merayu atau tidak terhadap keputusan mahkamah bicara tersebut. Tiada keputusan antara pihak-pihak untuk terikat dengan keputusan MR yang dibawa oleh responden. Adalah menjadi salah untuk mencadangkan kesahhan perjanjian tersebut dipanjangkan selepas peringkat perbicaraan kerana wujud peraturan yang mentadbir rayuan ke MR yang 36 defendan yang lain harus patuhi. Peraturan tersebut terpakai terhadap setiap satu defendan dan bukan sahaja kepada defendan dalam 'test case', seperti pembayaran deposit rayuan ke mahkamah. Keperluan untuk mematuhi perintah tersebut menekankan keperluan untuk pihak-pihak lain memfailkan rayuan mereka sendiri terhadap keputusan mahkamah bicara dalam test kes dengan kesan yang akan mengiring sekiranya gagal untuk membuat sedemikian. Tiada apa-apa dalam Kaedah-Kaedah Mahkamah Rayuan 1994 yang membenarkan cara yang diambil oleh repsonden dalam rayuan ini (lihat perenggan 18, 54–56, 61 & 70).

(5) MR tiada bidang kuasa untuk mengetepikan keputusan mahkamah bicara yang melibatkan 36 defendan yang lain dalam ketiadaan notis rayuan yang difailkan oleh mereka. Hujahan bahawa satu rayuan merupakan pendengaran semula hanya benar apabila wujud satu rayuan terhadap keputusan. Dalam kes ini, hanya wujud satu rayuan yang difailkan dan ianya adalah oleh responden. Dengan tidak merayu, 36 defendan lain harus dianggap sebagai menerima keputusan mahkamah bicara (lihat perenggan 58–59).

(6) Dalam menolak tuntutan perayu, MR gagal untuk mengiktiraf bawah kegagalan responden untuk mematuhi notis keluar adalah alasan berasingan yang diplidkan untuk tuntutan perayu. Tuntutan tersebut tidak berpremiskan semata-mata atas kegagalan responden untuk membayar sewa tahunannya (lihat perenggan 77–78).

(7) Atas keterangan, mahkamah bicara adalah benar dalam membenarkan tuntutan perayu apabila membuat dapatan fakta bahawa responden telah gagal untuk mematuhi notis keluar perayu yang telah diberikan lebih satu tahun terdahulu. MR tiada sebab untuk mengetepikan dapatan mahkamah bicara tersebut. Keputusan MR adalah berdasarkan premis yang salah bahawa cukai tahunan telah dibayar oleh responden tanpa mengamati fakta bahawa tuntutan perayu juga berdasarkan kegagalan responden untuk mematuhi notis keluar tersebut. Kekhilafan oleh MR ini adalah serius untuk untuk memerlukan campur tangan daripada mahkamah ini (lihat perenggan 79–81).]

**Cases referred to**

*A Santamil Selvi a/p Alau Malay @ Anna Malay & Ors v Dato' Seri Mohd Najib bin Tun Abdul Razak & Ors* [2015] 4 MLJ 583; [2015] 4 CLJ 1016, CA (refd)

A *Balwant Rao and others v Baji Rao and others* (1920) 2 MLJ 166, PC (refd)
*Berjaya Development Sdn Bhd v Keretapi Tanah Melayu Bhd* [2014] 4 MLJ 606, CA (refd)
*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
B *Compania Merabello San Nicholas SA, Re* [1972] 3 All ER 448, Ch D (refd)
*Deepak Jaikishan v A Santamil Selvi a/p Alau Malay @ Anna Malay (as the executrix of the estate of Balasubramaniam a/l Perumal, deceased) & Ors* [2017] 4 MLJ 11, FC (refd)
*Eastern Bay Independent Industrial Workers Union Inc v Carter Holt Harvey*
C *Ltd* [2010] NZEMPC 56 (refd)
*Edwards v Law Society of Upper Canada* [1998] OJ No 6192 (refd)
*Evans v Wilson* [2014] OJ No 2708 (refd)
*First Choice Capital Fund Ltd v First Canadian Capital Corp* [1999] SJ No 333 (refd)
D *Healey v A Waddington & Sons* [1954] 1 WLR 688, CA (refd)
*Housen v Nikolaisen* [2002] 2 SCR 235, SC (refd)
*Humphries v Newport Quays Stage 2A Pty Ltd* [2009] FCA 699, FC (refd)
*Jane Doe 1 v Manitoba* [2008] MJ No 292 (refd)
*Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3
E MLJ 627, CA (refd)
*Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2018] 6 MLJ 222; [2018] 8 CLJ 409, CA (refd)
*Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320, FC (refd)
*Kumpulan Emas Bhd v Dato' Lim Teng Lew & Anor* [2004] 2 MLJ 614, HC
F (refd)
*Lam Pik Shan v Hong Kong Wing On Travel Service Ltd* [2008] HKCU 1567, CA (refd)
*Langkawi R & D Academy Sdn Bhd v Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors* [2012] 5 MLJ 662; [2013] 3 CLJ 1006, CA (refd)
G *Loh Ah Sang v Tropicana Golf & Country Resort Sdn Bhd and other actions* [1992] MLJU 91, HC (refd)
*Mohd Fauzi bin Abdul Majid v Inspector General Of Police, Malaysia & Ors and other applications* [1994] MLJU 309, HC (refd)
*Ng Chin Chai v Pentadbir Tanah Segamat and other appeals* [2016] MLJU
H 1702; [2016] 4 CLJ 693, CA (refd)
*R v Nayanookeesic* [2005] OJ No 2354 (refd)
*Reid v New Zealand Fire Services Commission* BC199570638 (unreported), HC (refd)
*S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015]
I 5 MLJ 717, FC (refd)
*Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177, FC (refd)
*Thien Kon Thai, Re* [2008] 6 MLJ 278, CA (refd)
*Vennell v Barnado's* [2004] OJ No 4171 (refd)

**Legislation referred to**

Rules of Court 2012 O 4 r 1, O 18 r 12
Rules of the Court Appeal 1994

**Appeal from:** Appeal No J-02(NCVC)(W)-869–05 of 2017 (Court of Appeal, Putrajaya)

*John Mathew (Tan Koon Heo and Edward Kuruvilla with him) (KH Tan & Co) for the appellant.*
*Wong Lian Chin (Tunku Amiruddin bin Tunku Yusof, S Janagasutha a/p D Sivayogarajan, William Lian Chin and Quek Kia Ping with him) (Tunku Amiruddin & KK Chew) for the respondent.*

**Abdul Rahman Sebli FCJ (delivering judgment of the court):**

**[1]** We had allowed the appellant's appeal by answering leave question 1 in the negative and declining to answer leave questions 2 and 3. The background to the appeals has its genesis in the High Court when the appellant, who sued in his capacity as the registered Public Officer of Eng Choon Association Muar (Eng Choon Huay Kuan, Muar), Johor filed 50 suits against 50 different defendants (one of whom was the respondent) for similar reliefs in relation to 50 different premises.

**[2]** The 50 suits were filed and registered separately and were given different registration numbers. The reliefs that the appellant sought against the defendants were the following:

(a) an order that the defendant and/or all persons that reside thereunder are required to vacate and deliver vacant possession of the relevant premises (in the case of the respondent, having specific address of 22–1, Jalan Hashim, 84000 Muar, Johor) for non-payment of quit rent;

(b) general and/or special damages to be assessed;

(c) interest;

(d) costs; and

(e) such further and/or other relief as the court deems fit and proper.

**[3]** In response, each of the 50 defendants filed a counterclaim against the appellant seeking, amongst others, various declaratory and injunctive reliefs and orders in respect of the said premises and land.

**[4]** The appellant had, on 13 December 2013 (prior to the filing of the 50 suits) issued to the respondent a notice to quit stating, amongst others, as follows:

(a) '(w)e are now instructed by our clients to give you notice, which we hereby do, that you do quit and deliver vacant possession of the demised premises on 31 December 2014 or at the end of the period of tenancy expiring next'; and

(b) 'TAKE NOTICE that if you fail, refuse and/or neglect to quit and deliver vacant possession of the demised premises by 31 December 2014 or at the end of the period of tenancy expiring next, then we have firm instructions to commence with the appropriate eviction proceedings against you in which event you shall be liable for all the costs incurred. Our clients also reserve their rights to claim against you for all the losses and damages suffered by them together with interest thereon'.

**[5]** Despite being given more than one year's notice to quit and to deliver vacant possession of the demised premises, the respondent failed to so on or before 31 December 2014.

**[6]** What is pertinent to note is that although the 50 suits were similar in nature in that they were based on similar facts and issues, they nevertheless remained, at all material times, separate and distinct as they involved different defendants and different premises.

**[7]** Of the 50 suits, the appellant obtained judgment in default against 13 defendants. The remaining 37 suits were contested. As the facts and issues of law in the remaining 37 suits were similar, parties had, by way of a consensus, agreed for the action in the present suit (Muar High Court Civil Suit No 22NCVC-66–10 of 2015: *Lim Choon Seng v Lim Poh Kwee*) to be tried as a 'test case' whereby the decision in the case would bind the other 36 defendants in the other 36 suits, whichever way the decision was to go. It was an agreement to swim and sink together so to speak.

**[8]** Thus, if the defendant (respondent) in the test case were to be found liable, the other 36 defendants in the other 36 suits would likewise be held liable to the appellant, and vice versa. Such agreement will be upheld by the court, barring any breach of any rule of law written or otherwise. There was no application for consolidation pursuant to O 4 r 1 of the Rules of Court 2012. Therefore the trial of the 37 suits did not proceed as one action.

**[9]** Due to the agreement between the parties, the other 36 defendants in the other 36 suits did not testify at the trial. According to learned counsel for the respondent, it was in reliance on the appellant's 'representation' that the other 36 defendants in the other 36 suits waived their right to be heard at the trial.

**[10]** The High Court delivered its decision on the test case on 27 March

2017, allowing the appellant's claim and dismissing the respondent's counterclaim. The decision auto-triggered the agreement between the parties, thus rendering the other 36 defendants in the other 36 suits severally liable to the appellant. Only one order as to costs was made, to be paid jointly by the 37 defendants. The High Court went on to make an order that 37 separate judgments be filed for the 37 suits.

**[11]** The appellant duly complied with the order by preparing 37 separate draft judgments for the 37 suits. Before us, learned counsel for the respondent took exception to what he called a 'tactic' by the appellant. According to counsel, it was wrong for the appellant to try to defend the High Court judgment against the other 36 defendants in the other 36 suits when he was conspicuously silent at the time the judgment was pronounced and only served the separate judgments after the expiry of the 30-day limitation period for the lodgment of appeal.

**[12]** We will deal the complaint right away. The other 36 defendants in the other 36 suits could have applied for extension of time to file their notices of appeal if, as they claimed, they were only served with the separate judgments after the expiry of the limitation period for the filing of appeal. The record does not show that this option was even considered by the other 36 defendants.

**[13]** More importantly, the order that 37 separate judgments were to be prepared was made by the High Court at the time the judgment in the test case was delivered. This should have alerted the other 36 defendants of the need to file separate appeals against the decision. The complaint is therefore devoid of merit.

**[14]** Dissatisfied with the decision of the High Court in the test case, the respondent lodged a notice of appeal against the whole of the judgment, purportedly on his own behalf and on behalf of the other 36 defendants in a representative capacity, meaning to say his appeal was not only to cover his appeal but also the appeals by the other 36 defendants in the other 36 suits. In doing so, the appellant and the 36 defendants were treating the action as if it was a representative action envisaged by O 18 r 12 of the Rules rather than as a test case. We reproduce below the material contents of the notice of appeal:

> *SILA AMBIL PERHATIAN* bahawa *LIM POH KWEE (No K/P: 580606-01-5295,* Perayu yang dinamakan di atas yang tidak berpuas hati dengan keseluruhan keputusan Yang Arif Hakim Datuk Wira Halijah Binti Abbas yang diberikan di Mahkamah Tinggi Muar pada 27 haribulan Mac 2017 (yang mengikat guaman sivil — guaman sivil no 22NCVC-46-10/2015, 22NCVC-47-10/2015, 22NCVC-48-10/2015, 22NCVC-49-10/2015, 22NCVC-50-10/2015, 22NCVC-51-10/2015, 22NCVC-52-10/2015, 22NCVC-53-10/2015, 22NCVC-54-10/2015, 22NCVC-55-10/2015, 22NCVC-56-10/2015,

22NCVC-57-10/2015, 22NCVC-58-10/2015, 22NCVC-59-10/2015, 22NCVC-60-10/2015, 22-NCVC-61-10/2015, 22NCVC-62-10/2015, 22NCVC-63-10/2015, 22NCVC-64-10/2015, 22NCVC-65-10/2015, 22NCVC-03-01/2016, 22NCVC-04-01/2016, 22NCVC-05-01/2016, 22NCVC-06-01/2016, 22NCVC-07-01/2016, 22NCVC-08-01/2016, 22NCVC-09-01/2016, 22NCVC-10-01/2016, 22NCVC-11-01/2016, 22NCVC-12-01/2016, 22NCVC-13-01/2016, 22NCVC-14-01/2016, 22NCVC-15-01/2016, 22NCVC-34-05/2016, 22NCVC-35-05/2016, 22NCVC-36-05/2016), merayu kepada Mahkamah Rayuan terhadap keseluruhan keputusan tersebut berkenaan dengan tuntutan Responden dan tuntutan balas Perayu yang memutuskan bahawa:-

(1) Tuntutan Responden terhadap Perayu untuk satu perintah supaya Perayu dan/atau semua orang-orang yang menuntut di bawahnya dikehendaki keluar dan menyerahkan milikan kosong premis yang dikenali sebagai 22-1, Jalan Hashim, 84000 Muar, Johor dibenarkan dan milikan kosong perlu diserahkan dlam tempoh 6 bulan dari Tarikh penghakiman;

(2) Tuntutan Balas Respondent ditolak;

(3) Kos prosiding hendaklah dibayar oleh Perayu (Bersama dengan Defendan-Defendan dalam guaman sivil — guaman sivil yang lain) sebanyak RM25,000.00 tertakluk kepada alokatur.

**[15]** Consequently, the other 36 defendants in the other 36 suits did not lodge any appeal against the decision in the test case. It was thus submitted by learned counsel for the appellant that since the 36 defendants did not do so, they were therefore not before the Court of Appeal and that the only parties before the Court of Appeal were the appellant and the respondent.

**[16]** Learned counsel for the respondent contended otherwise, submitting that since the appeal was against the single judgment of the High Court which bound the other 36 defendants in the other 36 suits, the single notice of appeal filed by the defendant in the test case was good in law to bring all 37 defendants before the Court of Appeal.

**[17]** Having heard the parties, the Court of Appeal allowed the respondent's appeal and set aside the decision of the High Court in the test case. The Court of Appeal made a further order that its decision was to bind the other 36 defendants in the other 36 suits. It was the same mechanism that was used by the High Court to enforce judgment against the other 36 defendants in the other 36 suits except that it was applied in the reverse by the Court of Appeal, this time against the appellant.

**[18]** It is to be noted however that while there existed in the High Court an agreement between the parties to be bound by the decision in the test case, there was no agreement between the parties in the Court of Appeal to be bound

by the decision of the Court of Appeal in the appeal brought by the respondent, not that the agreement would be valid if the parties had entered into it.

**[19]** It is not exactly clear what the Court of Appeal meant by the order and no request for clarification was made by either party to the panel that heard the appeal. We were told by learned counsel for the respondent that it was only three months after the lodgment of the appeal that the appellant sought for clarification in the preparation of separate judgments for the 37 suits.

**[20]** There was no dispute however that during the hearing of the respondent's appeal at the Court of Appeal, the appellant questioned the failure by the other 36 defendants in the other 36 suits to lodge separate notices of appeal against the decision of the High Court in the test case.

**[21]** The respondent's interpretation of the Court of Appeal order was that since the appeal was against the decision of the High Court that was binding on the other 36 suits, it follows that the decision of the Court of Appeal must also be binding on the other 36 suits, in the same way that the other 36 defendants in the other 36 suits were bound by the decision of the High Court in the test case. The basis for the argument was that an appeal operates as a rehearing and as such an appeal lodged by the defendant in the test case would as a matter of law automatically operate as an appeal by all 37 defendants in all 37 suits.

**[22]** What has become clear is that this was not a class action (there was only one plaintiff) and the order of the Court of Appeal was made against this backdrop:

(a) there was only one notice of appeal lodged by one defendant, ie the respondent in the instant case against one judgment of the High Court;

(b) there were 37 separate and distinct judgments of the High Court sealed by the Muar High Court for each respective suit;

(c) the 37 judgments of the High Court dealt with 37 separate and distinct premises;

(d) there was no express order or direction by the High Court that all 37 suits were to be consolidated and to be treated as one proceedings;

(e) there was no express order or direction by the High Court that it would be sufficient for one defendant to lodge a single appeal to bind all the remaining 36 defendants; and

(f) save for the bundle of pleadings, the relevant cause papers, documents and parties in the other 36 suits were not properly brought before the Court of Appeal.

**[23]** No reason was given by the Court of Appeal in making the impugned order, either at the time of pronouncing the judgment or in the grounds of decision. We can only presume that it was for the reason advanced by the respondent. Dissatisfied with the decision, the appellant appealed to this court and had been granted the following three leave questions for our determination:

*Leave Question 1*

Whether a decision of the Court of Appeal can in law effectively reverse the separate orders of the High Court made in separate but similar proceedings dealing with separate defendants where no appeals were lodged by these separate defendants before the Court of Appeal?

*Leave Question 2*

Whether an allegation made in a Statement of Claim, which allegation was abandoned and no evidence led in support thereof by the Plaintiff in the course of trial, is fatal to the Plaintiff's claim, notwithstanding that the Plaintiff's claim was independently supported and established on other pleaded grounds?

*Leave Question 3*

Whether the Court of Appeal can allow an appeal against a decision of the High Court based solely on the failure of a party asserting a plea to establish that plea, when that plea was abandoned and no evidence led in support thereof in the course of trial and despite the claim of the party being independently supported and established on other pleaded grounds?

**[24]** We shall deal with leave question 1 first, which called for a determination of what constitutes a 'test case' and how it operates in a situation obtaining in the present appeal. The leave question makes no mention of a 'test case' but as we see it, there are two parts to the question: (1) whether separate notices of appeal must be filed by each party to the test case action; and (2) if the answer to the question is in the affirmative, whether the Court of Appeal had the power to make any order against the other parties who did not lodge any appeal against the decision in the test case.

**[25]** There is a dearth of local authority on the point of law raised, thus necessitating our reliance on persuasive authorities from beyond our shores, in particular from other Commonwealth jurisdictions. According to learned counsel for the appellant, and this was not denied by learned counsel for the respondent, this is the first time that any Malaysian court is called upon to consider the following questions of general importance, namely:

(a) the definition of a 'test case';

(b) the requirements/nature of a 'test case'; and

(c) the treatment of a 'test case' on appeal vis a vis the other related cases.

**[26]** First, the dictionary meaning of a 'test case'. It will suffice if we refer to four of them. *Black's Law Dictionary* (7th Ed, 1999) defines a 'test case' as follows:

> test case. 1. A lawsuit brought to establish an important legal principle or right. Such an action is frequently brought by the parties' mutual consent on agreed facts — when that is so, a test case is also sometimes termed an amicable action; amicable suit. 2. An action selected from several suits that are based on the same facts and evidence, that raise the same question of law, and that have a common plaintiff or a common defendant. Sometimes, when all the parties agree, the court orders a consolidation and all parties are bound by the decision in the test case. — Also termed test action.

**[27]** *Jowitt's Dictionary of English Law* (2nd Ed) (Vol 2 – L-Z) (1977) defines it to mean: 'test case, an action on the result of which liability in other actions depends (*Healey v A Waddington & Sons* [1954] 1 WLR 688)'.

**[28]** The *Concise Oxford English Dictionary* (11th Ed, Revised) on the other hand defines a test case to mean: 'a case setting a precedent for other cases' which definition was adopted by the Superior Court of Justice of Ontario in *R v Nayanookeesic* [2005] OJ No 2354.

**[29]** A more succinct definition of a test case can be found in *The Dictionary of Canadian Law*, Daphne A Dukelow and Betsy Nuse, 1991 Thompson Professional Publishing Canada, Scarborough, Ontario, Canada, where it is defined as follows: 'An action whose result determines liability in other actions'.

**[30]** The phrase 'test case' has also been judicially defined. In the United Kingdom case of *Re Compania Merabello San Nicholas SA* [1972] 3 All ER 448 (Chancery Division, England & Wales), Megarry J opined as follows:

> The phrase 'test case' is, however, not used in the strict sense, but merely in the sense that there are other cases in which the parties are awaiting with interest the outcome of this case; and it may well be that any decision that I make will be taken to appeal.

**[31]** In New Zealand, Goddard J of the Wellington High Court proffered the following definition of a 'test case' in *Reid v New Zealand Fire Services Commission* BC199570638 (unreported):

> In a sense every case which is novel can be described as a test case. In another sense of the term, a test case is a case of a kind which, although decided as between two parties and perhaps in respect of a cause of action which is only a sample, is agreed or intended to affect not only those parties in respect of the sample cause of action but also those parties in respect of other similar occurrences and, in comparable circumstances, other parties bound by the same instruments. Another example of a test case is a case concerning the practice or procedure of this Court or some generalised ruling on a subject-matter involving or affecting many parties (*Fletcher*).

(See also *Adams* and *Unkovich*.) Not every case capable of description in one of these ways is necessarily a test case.

**[32]** In another New Zealand case, *Eastern Bay Independent Industrial Workers Union Inc v Carter Holt Harvey Ltd* [2010] NZEMPC 56 (Employment Court, Auckland), Chief Judge GL Golan opined as follows:

> That definition, which I agree defines the nature of some test cases is: '... one in which the parties agreed or intended to apply to other similar circumstances involving other parties; or which concerned the practice or procedure of the Court or some generalised ruling affecting many parties'. But a test case can sometimes be more than this. It can include a case where there is simply no precedent giving the parties or the Court sufficient guidance as to how a new statutory provision is to be interpreted and applied. In such cases only the immediate parties may be affected. The case is nevertheless one that tests the new law so that the judgment is useful, not only to the immediate parties in the resolution of their disputes but to others. In this sense the parties take on, albeit involuntarily, a burden of responsibility for others in employment relations to blaze a trail that others can not only follow but, knowing of its path, can order their affairs to avoid or minimise the need for future litigation. This is what has happened here and so the case is, in that sense, a test case.

**[33]** In Canada, the Ontario Superior Court of Justice in *Vennell v Barnado's* [2004] OJ No 4171 (Superior Court of Justice, Ontario) gave the following definition of a 'test case':

> A test case, as I understand it, ordinarily refers to a proceeding that will determine the issues that will arise in other cases that are pending or, at least, contemplated. Most commonly, I think, a party to a test case will also be involved in the other cases and will have agreed to accept the decision in the test case for the purposes of them. That has, for example, happened where, instead of proceeding to trial of common issues under the CPA, an individual action has been commenced as a test case that will bind the defendant for the purposes of the claims of other members of a class in which the individual plaintiff is included.

**[34]** Then there is the definition given by Sharpe J in *Edwards v Law Society of Upper Canada* [1998] OJ No 6192 (Ontario Court of Justice):

> My understanding of the meaning of the phrase test case is that given by Walker, The Oxford Companion of Law (1980) 'an action brought to ascertain a law, one of a number of similar actions which will all be determined by the same principle.

**[35]** On our part, we would adopt definition (2) of a 'test case' given by the learned authors of *Black's Law Dictionary* as reproduced in para 24 above, which is: 'An action selected from several suits that are based on the same facts and evidence, that raise the same question of law, and that have a common plaintiff or a common defendant'. The definition fits in with the factual matrix of the present case where there was a common plaintiff (appellant) and the

evidence and questions of law in all 37 suits were the same.

**[36]** So much for the meaning of a 'test case'. As to how a test case is to be applied in a given situation, the authorities suggest that before a test case can be said to exist, there must first be an agreement or concurrence between the parties to be bound by the decision in the test case: See the Hong Kong Court of Appeal case of *Lam Pik Shan v Hong Kong Wing On Travel Service Ltd* [2008] HKCU 1567 where it was held by Rogers VP (Le Pichon JA and Suffiad J concurring) as follows at para [2] of the judgment:

> This may have been the first case to go through the appeal process. It also appears to have been the first case, or certainly one of the first cases, in relation to this point that was decided by the Tribunal, but that does not make it a test case. Although for practical purposes the other claimants may abide by any decision which is given in this court or above or in the court below in respect of the 15th Claimant, that still does not make it a test case. There has been, as I understand it, no agreement or order making the decision in this case binding on all the other claimants as of right. In that case, the criterion for a test case does not exist.

**[37]** Canada takes the same position, as can be seen in *Jane Doe 1 v Manitoba* [2008] MJ No 292 (Court of Queen's Bench) where the importance of an agreement for a test case to exist was observed by P Schuman J in the following terms:

> 15 As for the suggestion that the plaintiffs proceed with a test case, that route is not followed generally without the concurrence of all potential claimants. Branch, *Class Actions in Canada*, loose leaf ed (Aurora: Canada Law Book), stated at para 4.945:
>
> > 4. Test cases
> >
> > Defendants often suggest that a test case would be just as efficient. However, a true test case requires the agreement of the parties; a court lacks jurisdiction to order that a party's rights will be decided in a case in which he or she is not a party ...
>
> At para 2.110, the author also stated:
>
> > ... Test cases require that the defendant and each prospective plaintiff agree to be bound by the result ...
>
> In *Murphy v BDO Dunwoody LLP,* [2006] OJ No 2729, the court held that it had no jurisdiction to order a binding test case. In *CIBC v Deloitte and Touche* [2003] OJ No 2069, the Divisional Court held that, 'Absent agreement by the defendants, there can be no test case which binds them'. In one Manitoba case, *Ranjoy Sales and Leasing Ltd. v. Winipeg Mortgage Exchange Ltd. Estate,* [1982] MJ No 11; reversed [1982] MJ No 36, arising from the collapse of Winnipeg Mortgage, a series of test cases were commenced, effectively, without the agreement of all potential claimants. Practicalities supported the initiation of the test cases.

**[38]** The decision of the Superior Court of Justice, Ontario in *Evans v Wilson* [2014] OJ No 2708 is closest to the point where it was held that without an agreement between the parties to be bound by the 'test case', there would effectively be no mechanism in place to enforce such a decision against the other parties. The relevant passage in the judgment reads:

> With regards to the Bank's proposal of a test case, absent an agreement between the parties, there is no mechanism for enforcing a decision which would be binding on all members of the class. In addition, there is no method of giving notice to all members of the class in the proposed test case, nor a mechanism to ensure that different individuals are bound by the result. A class proceeding provides a method for giving notice, gives potential class members an option to opt-out, if they do not wish to be part of the class proceeding, and produces a legal decision that is binding on all members of the class. I find that a class proceeding is preferable to an unstructured, unenforceable test case that is without the agreement of all parties and without a method of giving notice.

**[39]** Baynton J spoke of the 'practical benefits' of a test case when he said in *First Choice Capital Fund Ltd v First Canadian Capital Corp* [1999] SJ No 333, the Court of Queen's Bench Division, Saskatchewan:

> In considering a test case model it is important to distinguish between legal and practical considerations. Seldom would practical considerations outweigh legal ones. A test case would not likely be ordered if the price of expediency was the curtailment of the legal rights of any of the litigants. But on the other hand, a test case should not be denied just because a litigant feels threatened by it. If actual legal prejudice cannot be satisfactorily demonstrated, the practical benefits of a test case likely outweigh the risks of legal prejudice. As well, in many instances of potential prejudice can be avoided by including innovative terms in the order granting the test case relief.
>
> In the case before me, all the legal and factual issues respecting the individual plaintiffs' claims are substantially the same. They all invested money in the three FCC funds I mentioned previously and all became preferred shareholders of the funds. The issues of alleged fiduciary duties, duties of care, misrepresentation, breaches of those duties, negligence, and the like, are all common issues of each individual plaintiff's claim. Likewise all of the documents involved in the claims are substantially the same.

**[40]** We accept the proposition that before a test case can bind the other cases, there must first be an agreement between the parties to that effect. The agreement is to provide the mechanism to enforce the judgment in the test case against the other parties: *Evans v Wilson*. This was a case on class action but in our view the principle applies equally well to a test case action.

**[41]** That said, the question remains whether a single notice of appeal filed by the party in the test case can operate as a common notice of appeal to cover appeals by the other parties. In the context of the present appeal, the question

is whether the other 36 defendants in the other 36 suits could hitch a ride on the respondent's notice of appeal to pursue their appeals without lodging notices of appeal of their own.

**[42]** Learned counsel for the respondent cited no authority for the proposition that a single notice of appeal filed in respect of a test case is sufficient compliance with the rules on the filing of appeals to the Court of Appeal.

**[43]** The appellant's contention was that since the other 36 suits were not consolidated and were distinct and separate from the suit in the test case, separate notices of appeal ought to have been filed by the other 36 defendants in the other 36 suits notwithstanding the agreement by the parties to be bound by the decision in the test case.

**[44]** It was further argued that since there were 37 separate judgments drawn up as ordered by the High Court, 37 notices of appeal ought to have been lodged against the decision in the test case. We were referred to the High Court case of *Loh Ah Sang v Tropicana Golf & Country Resort Sdn Bhd and other actions* [1992] MLJU 91 where Abu Mansor J (as he then was) said:

> The procedure of naming a case as a test case in as many as 24 suits before the court where the issues in each case were similar had been regularly done to save the court's and the parties' time and the court had sought counsel's consent it was given. The trial went on for four days. The court pronounced judgment in one but as agreed made it applicable to all suits. If the plaintiffs did not agree with that judgment the proper thing was to appeal. There was ample time to do so but the plaintiff did not appeal.

**[45]** It does appear that the trial by way of a test case in that action was at the prompting of the court, which parties then consented to. In the Australian Federal Court (equivalent to our High Court) case of *Humphries v Newport Quays Stage 2A Pty Ltd* [2009] FCA 699 Besanko J observed that if there was an agreement between the parties to select a 'test case' and all other parties agree to be bound by it and the cases are tried at the same time, it is likely that all appeals will also be heard at the same time. The suggestion clearly envisages the lodging of more than one appeal against the decision in the test case.

**[46]** The respondent's answer to the appellant's argument, apart from what we have mentioned, was as follows:

(a) there was only one decision pronounced by the High Court and thus the respondent appealed against that one decision;

(b) although the appellant had filed 37 separate judgments, all the other 36 judgments in the other 36 suits were derived from the judgment in the test case;

(c) the filing of separate draft orders on a singular judgment and after the expiry of the time frame for lodging the notice of appeal is an affront to the notion of justice and highly prejudicial to the respondent and the parties in the other 36 suits;

(d) the fact that the 37 suits were not consolidated was of no consequence as the parties had agreed to be bound by the decision in the test case: *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; *Kumpulan Emas Bhd v Dato' Lim Teng Lew & Anor* [2004] 2 MLJ 614. Therefore, the single notice of appeal lodged by the respondent was good in law to cover appeals by the other 36 defendants in the other 36 suits without having to file their own notices of appeal;

(e) the appellant was bound by the express agreement between the parties and that his insistence on separate notices of appeal to be filed by the other 36 defendants in the other 36 suits was in breach of the agreement between the parties and that estoppel by conduct and waiver applied against the appellant: *Langkawi R & D Academy Sdn Bhd v Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors* [2012] 5 MLJ 662; [2013] 3 CLJ 1006; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283;

(f) the Court of Appeal was merely upholding the consensus of the parties and therefore did not err in its decision; and

(g) since an appeal operates as a rehearing, any agreement on the mode of trial and the consensus reached between the parties in the court of first instance is not subject to appellate review.

**[47]** So, it is clear that the whole structure of the respondent's argument is calibrated on the existence of the agreement between the parties to be bound by the decision in the test case which, according to learned counsel, continued to be valid and enforceable not only in the Court of Appeal but beyond.

**[48]** Carried to its logical conclusion, the argument means that a Court of Appeal can reverse or set aside the decisions or orders of the High Court made in separate and distinct proceedings, with separate and different parties, although no separate appeals were lodged by the other aggrieved parties against the decisions or orders which affected them.

**[49]** Having considered the rival arguments carefully, we were inclined to agree with the appellant and rejected the proposition advocated by the

respondent. In our view, the mere existence of an agreement between the parties to be bound by the decision in the test case cannot in law exempt the other parties from lodging their own notices of appeal against the decision.

**[50]** Although the liabilities of the other 36 defendants in the other 36 suits were determined by the liability of the defendant in the test case, their liabilities were separate and distinct from the liability of the defendant in the test case. To each his own liability.

**[51]** The true effect of the decision in the test case was that 37 separate judgments were delivered by the High Court although only one judgment was pronounced. We do not think it will make sense to argue that the judgment was only in respect of the test case and none in respect of the other 36 suits. That will defeat the whole purpose of having trial by a test case. It will also run contrary to the respondent's argument that he was also appealing on behalf of the other 36 defendants in the other 36 suits. Learned counsel for the respondent was absolutely right in not pursuing this line of argument.

**[52]** What needs to be appreciated is that there was no merger or joinder of liability among the 37 defendants by their agreement to be bound by the decision in the test case such that the liabilities of the other 36 defendants in the other 36 suits were merged with the liability of the defendant in the test case.

**[53]** As we said, their liabilities were separate and distinct from the liability of the defendant in the test case. Thus, even if the parties had agreed for a single notice of appeal to be filed against the decision in the test case, the agreement could not override the legal requirement that notices of appeal must be filed by each of the other 36 defendants in order to properly bring them and the other 36 suits before the Court of Appeal.

**[54]** It must also be appreciated that the agreement between the parties to be bound by the decision in the test was not an agreement without an expiry date. Once judgment in the test case was pronounced and the trial came to an end, the agreement came to an end.

**[55]** It is wrong to suggest that the validity of the agreement extended beyond the trial stage as there are rules governing appeals to the Court of Appeal that the other 36 defendants in the other 36 suits must comply with. These rules apply to each and every one of the defendants and not just to the defendant in the test case.

**[56]** The need to comply with these rules underscores the need for the other parties to lodge their own appeals against the decision of the High Court in the test case, with the attendant consequences should they fail to do so. There is

A nothing in the Rules of the Court Appeal 1994 ('the RCA') that allows for the mode adopted by the respondent in the present appeal.

**[57]** The conduct of the trial by way of a test case was purely for the convenience of the parties (including the court) and to save time and cost and
B for no other purpose, least of all to circumvent any mandatory requirement of law, procedural or substantive that applies in relation to appeals to the Court of Appeal, although in fairness to the 37 defendants, we are not suggesting that this was their intention.

C

**[58]** Be that as it may, by not lodging any appeal against the decision in the test case despite being adversely affected by it, the other 36 defendants in the other 36 suits must be deemed to have accepted the decision of the High Court in allowing the appellant's claim and dismissing their counterclaims.

D

**[59]** The Court of Appeal had no jurisdiction to set aside the decision in the absence of any appeal by the other 36 defendants in the other 36 suits. The argument that an appeal is a rehearing only holds true where there is an appeal against the decision. In the present case, out of the 37 judgments affecting 37
E defendants, only one appeal was lodged, and that was the appeal lodged by the respondent and none by the other 36 defendants.

**[60]** Given the factual makeup of the case, the High Court was correct in ordering for 37 separate judgments to be prepared for the 37 suits, thus
F requiring 37 separate notices of appeal to be filed and not just one. At the risk of repetition, it bears emphasis that the 37 suits were distinct and separate suits, the only link between the suits being the agreement between the parties to be bound by the decision in the test case.

G **[61]** That link was broken when the trial ended and from that point onwards the other 36 defendants in the other 36 suits must decide for themselves whether to lodge any appeal against the decision which adversely affected them directly and individually, in the same way that it adversely affected the defendant in the test case directly and individually. We are not aware of any
H written law or common law principle that allows for the assignment of the other 36 defendants' right of appeal to the respondent acting in a representative capacity.

**[62]** In *Ng Chin Chai v Pentadbir Tanah Segamat and other appeals* [2016]
I MLJU 1702; [2016] 4 CLJ 693 there was agreement between the parties for the test case in the four separate land references to bind the parties, but unlike the other 36 defendants in the present case, the parties in that case filed four separate notices of appeal against the decision of the High Court in the test case. In delivering the unanimous decision of the court, this is what Alizatul

Khair Osman JCA (as she then was) noted in the opening paragraph of her judgment at p 697 (CLJ): A

> [1] These four appeals arose out of the decision of the learned High Court Judge in respect of Land Reference No. 15NCVC-23-11-2012 (Appeal J-01(NCVC)(A)-155-04-2013) in which he had awarded the appellant therein (Ng Chin Chai) additional compensation of RM76,812 for the acquisition of Lot 333, Grant No. 1839, Mukim Sungai Segamat, Daerah Segamat, Johor. The learned judge with the agreement of all parties, had used this case as a 'test case' whereby the decision in the said case would bind the other three land reference cases, namely: B
>
> (i) No 15NCVC-24-11-2012 (Appeal J-01(NCVC)(A)-156-04-2013); C
>
> (ii) No 15NCVC-25-11-2012 (Appeal J-01(NCVC)(A)-157-04-2013); and
>
> (iii) No 15NCVC-26-11-2012 (Appeal J-01(NCVC)(A)-158-04-2013.'

**[63]** When the appeal in the test case was eventually dismissed, the other three related appeals were also dismissed. Of significance to note is that a determination was made on each and every appeal by the Court of Appeal and not just on the test case, unlike the present case where the Court of Appeal only made a determination on the test case and not on the other 36 cases, other than to make an order that its decision was to bind the other 36 cases. D E

**[64]** This was also the situation in the Privy Council case of *Balwant Rao and others v Baji Rao and others* (1920) 2 MLJ 166 although, it must be stated, it appears that all the appeals in that case were consolidated, as opposed to being heard together. This can be deduced from the observations made by Lord Dunedin at p 169: F

> Accordingly, one action was taken as a test case, the others abiding by its result. The learned District judge found that she had, an absolute interest; but on appeal the Judicial Commissioner reversed his decree. Formal judgments in all the actions were pronounced. Appeal has been taken to this Board, and all the appeals are consolidated. G

**[65]** The law must now be taken as settled that where proceedings are separate and distinct, separate notices of appeal must be filed: see *Deepak Jaikishan v A Santamil Selvi a/p Alau Malay @ Anna Malay (as the executrix of the estate of Balasubramaniam a/l Perumal, deceased) & Ors* [2017] 4 MLJ 11 where it was held by this court that the filing of a single notice of appeal in respect of eight separate decisions involving eight separate applications and eight different parties was procedurally non-compliant with the mandatory provisions of the RCA. Zulkefli Ahmad Makinudin CJ (Malaya) (as he then was) held at p 19: H I

> [20] It is also to be noted that each of the defendant in the High Court had filed eight separate applications to strike out the plaintiffs' statement of claim. All eight

A applications had different grounds in support of the respective application, different filing dates and even different counsels. The learned High Court Judge delivered a single judgment encompassing all the eight applications. It is our judgment by way of procedural rules there were eight separate orders made by the learned High Court Judge. We would therefore answer the second question posed before us in the B negative.

**[66]** It was in fact a decision that arose from an appeal by the eighth respondent (Deepak Jaikishan) in the Court of Appeal case of *A Santamil Selvi a/p Alau Malay @ Anna Malay & Ors v Dato' Seri Mohd Najib bin Tun Abdul* C *Razak & Ors* [2015] 4 MLJ 583; [2015] 4 CLJ 1016 where the Court of Appeal observed as follows at para [18] of the judgment:

> [18] At the risk of repeating ourselves, we must stress the point that although the eight striking out applications were heard together before a single judge and D judgment delivered on a single date, the fact is, separate decisions were given for each of the eight applications. It is inconceivable that the eight decisions made by the learned judge were embodied in one single decision. That is not borne out by the record, nor is it a logical proposition. The fact that only one grounds of decision was delivered does not alter the fact that eight separate decisions were given.

E

**[67]** In an earlier Court of Appeal decision delivered by Abdul Aziz Abdul Rahim JCA, *Berjaya Development Sdn Bhd v Keretapi Tanah Melayu Bhd* [2014] 4 MLJ 606, it was held, inter alia, that the filing of one notice of appeal in respect of three decisions delivered by the High Court was improper F for being ambiguous and uncertain and that the proper way would have been to file three notices of appeal, one in respect of each decision that was appealed against.

**[68]** In another Court of Appeal decision, *Khairy Jamaluddin v Dato' Seri* G *Anwar bin Ibrahim* [2018] 6 MLJ 222; [2018] 8 CLJ 409, Tengku Maimun Tuan Mat JCA (now CJ) referred to *Deepak Jaikishan* and said as follows at p 233(MLJ); p 420 (CLJ):

> [32] Nevertheless, in our view, the principle to be distilled from the decision of the Federal Court in *Deepak Jaikishan*, is not so much about the number of applications H or the number of parties but whether there was a distinct and separate application resulting in a distinct and separate order by the court. If there was a distinct and separate order of the court, then there ought to be a separate notice of appeal filed in respect of the separate and distinct order appealed against.

I **[69]** We are mindful that *Deepak Jaikishan* is not a case on test action but a juxtaposition of the facts with the facts of the present appeal will show a similarity in pattern in that 37 separate judgments were delivered in respect of the 37 suits, and this is over and on top of the fact that the High Court had ordered for 37 separate judgments to be filed.

**[70]** Further, it must be remembered that appeals to the Court of Appeal involve payment of deposits into court. In this regard, what KN Segara JC (as he then was) said in *Mohd Fauzi bin Abdul Majid v Inspector General Of Police, Malaysia & Ors and other applications* [1994] MLJU 309 is instructive although not said in the context of a test case. This is what the learned JC said:

> In anticipation of an appeal by the solicitors for the 155 plaintiffs, I wish to point out that, as a matter of practice and procedure, notices of appeal will have to be lodged in each of the 155 cases (unless, of course, the solicitors deem fit not to proceed with an appeal in some of the 155 cases). Had these actions been consolidated or representative proceedings commenced, much of the inconvenience and predicament the solicitors are facing to-day could have been avoided. This court cannot rule that only one case proceed on appeal and the decision be binding on all the others without notices of appeal being filed *in each* of the respective cases and the *usual deposit* paid into Court *for each of the appeals*. In order to avoid any confusion and misunderstanding, each of the 155 civil suits will carry this judgment entitled with the plaintiff's name, followed by a reference to the numbers of the other 154 cases.

**[71]** That disposes of the first part of leave question 1. As for the second part of the question, the general rule is that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against or bind a non-party: see *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320 where Seah FJ delivering the judgment of the former Federal Court said:

> In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions (*Brydges v Brydges & Wood*; *Re Shephard* and *Coleman*). The terms 'judgment' and 'order' in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court (see para 501 of *Halsbury's Laws of England* (4th ed) Vol 26 at p 237).

**[72]** There are two exceptions to the general rule and they are: (1) injunctions; and (2) where the non-party is the alter ego of the person already impleaded and before the court: See the judgment of Gopal Sri Ram JCA (as he then was) delivering the unanimous decision of the Court of Appeal in *Re Thien Kon Thai* [2008] 6 MLJ 278.

**[73]** Neither of these exceptions applied in the present case, yet an order was made by the Court of Appeal which benefited the other 36 defendants in the other 36 suits who were not even before the court for having failed to lodge any appeal against the decision of the High Court.

**[74]** Having regard to the authorities referred to above, we were constrained

to rule that the Court of Appeal was wrong in making the impugned order, being in conflict with two principles of law, namely: (1) where proceedings are separate and distinct, separate notices of appeal must be filed; and (2) a court cannot pronounce any judgment or order that binds non-parties who are not properly brought before the court unless the two exceptions apply.

**[75]** The proper procedure to be followed in an appeal involving a 'test case' is as follows:

(a) an agreement by all parties for one case to be tried as the 'test case' and that the decision in the test case will bind all other parties in the other related cases;

(b) pronouncement of the decision in the 'test case';

(c) formal judgments to be drawn up for each and every case even where the court makes no such order;

(d) separate notices of appeal to be lodged by each and every party aggrieved by the decision in the 'test case'; and

(e) if more than one appeal is lodged, the appeals to be heard together.

**[76]** It was for all the reasons aforesaid that we answered leave question 1 in the negative, ie that a decision of the Court of Appeal cannot in law effectively reverse the separate orders of the High Court made in separate but similar proceedings dealing with separate defendants where no appeals were lodged by these separate defendants before it.

**[77]** With regard to leave questions 2 and 3, we noted that the appellant's claim was premised on the respondent's failure to comply with the notice to quit and not solely and entirely on the respondent's failure to pay the annual rental, which must have weighed heavily in the Court of Appeal's mind in allowing the respondent's appeal and reversing the High Court decision.

**[78]** It is clear that in dismissing the whole of the appellant's claim, the Court of Appeal failed to recognise that the respondent's failure to comply with the notice to quit was a separate basis for the appellant's claim, which was a pleaded basis.

**[79]** The trial court's finding of fact was that the notice to quit was duly issued by the appellant and the respondent failed to comply with the notice despite being given more than one year's notice to deliver vacant possession of the demised premises. At common law a yearly tenant is entitled to no more than six months' notice to quit: see the decision of this court in *S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717.

**[80]** On the evidence before him, the learned trial judge was perfectly entitled to arrive at such finding of fact. The High Court was therefore correct in allowing the appellant's claim and to grant the relief of vacant possession. We found no compelling reason for the Court of Appeal to interfere with the decision of the High Court, based as it was on the wrong premise that the annual rental had been paid by the respondent when the appellant's claim was also premised on the respondent's failure to adhere to the notice to quit, which had been proved.

**[81]** The error is serious enough in our view to warrant interference by this court, hence our unanimous decision to allow the appellant's appeal, set aside the decision of the Court of Appeal and reinstate the decision of the High Court.

**[82]** The principle on which an appellate court could interfere with findings of fact by the trial court was re-emphasised by this court in reversing the decision of the Court of Appeal in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177. It is the 'plainly wrong' test, in the sense that the finding cannot reasonably be explained or justified and so is one which no reasonable judge could have reached; and that if the appellate court is not satisfied that the decision suffers from that infirmity, it is irrelevant that with whatever degree of certainty, it would have considered that it would have reached a different conclusion from that of the trial judge.

**[83]** Thus, the mere fact that the appellate court would have come to a different conclusion on the evidence is not a ground for interference except where the decision of the trial court was based entirely on inferences to be drawn from the proved facts (as opposed to findings which involved the issue of the credibility of the witnesses), in which case the appellate court would be placed in the same position as the trial court. We do not think it is necessary to cite any authority for this trite proposition of law.

**[84]** The principle was applied with full force by this court when, in reversing and setting aside the decision of the Court of Appeal, it gave the following reasons, amongst others, for its decision:

(a) the Court of Appeal misread or misapprehended the judgment of the High Court;

(b) the Court of Appeal did not make the appropriate determination that the trial court's conclusions on primary facts were plainly wrong, bearing in mind 'appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole' (*Housen v*

*Nikolaisen* [2002] 2 SCR 235) — the majority judgment of the Supreme Court of Canada;

(c) the Court of Appeal did not impeach the High Court judge's analysis of the evidence on pivotal issues of fact and other critical issues in dispute between the parties;

(d) the underlying basis for the Court of Appeal to justify its appellate interference was wholly misconceived and untenable, leading to a flawed finding that there was a misdirection in law and fact on the part of the High Court; and

(e) the basis on which the Court of Appeal relied on in justifying appellate intervention with the judgment of the High Court was based on flawed findings, the result of which was a severe miscarriage of justice.

**[85]** Although leave questions 2 and 3 are couched in legalistic language, they are clearly fact centric and as such required no answer from us. It was for this reason that we declined to answer the questions.

*Appeal allowed; COA's decision set aside; and the High Court decision reinstated.*

Reported by Ashok Kumar